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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Atmel Corporation

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Serial Nos. 76223479 and 76223480

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Gina McCarthy of the Law Offices of Thomas Schneck for Atmel Corporation.

Shari Sheffield, Trademark Examining Attorney, Law Office 110 (Chris Pedersen, Managing Attorney).

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Before Seeherman, Bottorff, and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On March 12, 2001, Atmel Corporation (applicant) applied to register two marks on the Principal Register. The first application is for the mark IPITEC in typed form.[1] The second application is for the mark IPITEC in the stylized form shown below:[2]

[1] Serial No. 76223480.
[2] Serial No. 76223479.

Both applications are based on an allegation of a bona fide intention to use the marks in commerce. Ultimately, the identifications of goods in both applications were amended to read as follows: "integrated circuit chips, namely digital signal processors, and computer software, namely compilers, debuggers, simulators, and assembler optimizers to support digital signal processor operations" in International Class 9.

The examining attorney[3] has refused to register applicant's marks on the ground that if the marks were used on or in connection with the identified goods, they would so resemble the registered mark, IPITEK (typed), for "fiber-optic data links, sensors and transmission apparatus" in International Class 9 as to be likely to cause confusion, to cause mistake or to deceive. 15 U.S.C. § 1052(d).[4]

[3] The current examining attorney was not the original examining attorney in these cases.
[4] Registration No. 1,641,149, issued April 16, 1991, renewed.

When the refusals were made final, these appeals followed.[5]

The examining attorney argues that applicant's marks are highly similar to the registrant's mark. The examining attorney also argues that "fiber optic apparatus and integrated circuits and software therefore can be found in the same channels of trade." Brief at 7.

Applicant submits that its marks and the registrant's mark "are dissimilar in commercial impression, appearance and connotation." Brief at 3. Regarding the goods, applicant maintains that registrant's fiber optic components "are known for promulgating optical, not digital signals… Registrant's goods are associated with optical signals and Applicant's goods are associated with electrical digital data and for at least that reason the goods are dissimilar and unrelated." Brief at 5.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567

[5] In view of their common questions of law and fact, we have consolidated these two cases for purposes of final decision and are issuing this single opinion. References to the record are to the '479 application.

(CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We first look at the similarities or dissimilarities of the marks. Regarding the typed marks, IPITEC and IPITEK, the only difference is the last letter, which are the phonetically similar letters, "C" and "K." Therefore, these marks would be pronounced identically. Concerning the appearance of the marks, the slight difference in the last letter of the marks would hardly be significant. "Side by side comparison is not the test." Grandpa Pigeon's of Missouri, Inc. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973). Considering "the fallibility of memory over a period of time and the fact that purchasers normally retain a general rather than a specific recollection of trademarks" (Roffler Industries, Inc. v. KMS Research Laboratories, 213 USPQ 258, 263 (TTAB 1982)) customers will not likely remember the differences in the marks because of these final, phonetically similar letters. Regarding

applicant's '479 mark, which is shown in stylized format, no difference can be asserted with the stylization of the registered mark. Squirtco v. Tomy Corp., 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983) ("[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display"). In addition, the stylization of applicant's mark would not overcome the strong similarities in the marks due to the arbitrary letter string IPITE.

We also cannot agree with applicant that the slight differences between "-tec" and "-tek" create different meanings. Brief at 4 (The "ending 'TEK' in the registrant's mark IPITEK does not carry the same connotation as 'TEC,' as it is without meaning and nonsensical. Thus, a different connotation is associated with each of the marks"). The use of the phonetically similar last letters would hardly create a different meaning nor would the element "TEK" in registrant's mark be considered "nonsensical."

> We must also consider the well-established principle of our trademark law that confusion is more likely between arbitrarily arranged letters than between other types of marks. This principle was set forth fifty years ago in the decision of the Court of Customs and Patent Appeals in Crystal Corp. v. Manhattan Chemical Manufacturing Co., 75 F.2d 506, 25 USPQ 5, 6, (1935) wherein the following reasoning was

applied in holding Z.B.T. likely to be confused with T.Z.L.B. for talcum powder.

> We think that it is well known that it is more difficult to remember a series of arbitrarily arranged letters than it is to remember figures, syllables, words, or phrases. The difficulty of remembering such lettered marks makes confusion between such marks, when similar, more likely.

Edison Brothers Stores, Inc. v. Brutting E.B. Sport-International GmbH, 230 USPQ 530, 533 (TTAB 1986).

Therefore, we conclude the discussion of this factor by finding that applicant's marks and the cited registration are very similar in sound, appearance, meaning, and commercial impressions.

Next, we look at the goods of applicant and registrant to determine if there is a relationship between them. We must consider the goods as they are described in the identification of goods in the application and registration. Octocom Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). The cited

registration contains no limitations so we must assume that registrant's fiber-optic data links, sensors and transmission apparatus travel through all normal channels of trade. Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages").

Furthermore, it is not necessary for the examining attorney to show that the registrant and applicant are competitors.

> [G]oods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services.

In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991).

Applicant's goods are integrated circuit chips, namely digital signal processors, and computer software, namely compilers, debuggers, simulators, and assembler optimizers to support digital signal processor operations.

Registrant's goods are fiber-optic data links, sensors, and transmission apparatus. The question is not whether the goods are identical or even used together but whether prospective purchasers would assume that the goods of applicant and registrant come from the same source.

We start our analysis of the relatedness of the goods by observing, as the excerpts from the record show, that integrated circuits are, of course, used with fiber optic technology.

> Agilent's leading-edge optoelectronic, mixed-signal, and digital integrated circuit technologies form key building blocks for high speed wired and mobile networks. Agilent is a leading supplier of CMOS sensors for digital imaging, RF and microwave semiconductors, infrared wireless and high performance fiber optic transceivers…
> www.agilent.com.

> TriQuint Semiconductor, Inc. (NASDAQ: TQNT) is a leading worldwide supplier of a broad range of high performance communications integrated circuits. TriQuints products span the RF and millimeter wave frequency ranges and employ analog and mixed signal circuit designs. They are used in fiber optics, telecommunications, wireless communications, and aerospace systems.
> www.triquint.com.

> NurLogic Design, Inc., a developer of high band connectivity solutions, today announced the successful delivery of its first parallel integrated circuit (IC) chipset for the high end communications industry… This chipset is the first NurLogic's roadmap of developing parallel fiber optic networking solutions, including transmitters and receivers and physical (PHY) layer devices.
> www.nurlogic.com.

Several registrations also suggest that integrated circuits and/or signal processors and fiber optic technology may originate from the same source. See Registration No. 2,076,848 (integrated circuits and fiber optic cable and fiber optic connectors); Registration No. 2,240,396 (signal processors and fiber optic cables); and Registration No. 2,306,528 (signal processors and fiber optic transmission products). See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source"). See also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993).

Applicant's argument that "Registrant's goods are associated with optical signals and Applicant's goods are associated with electrical digital data and for at least that reason the goods are dissimilar and unrelated" (Reply Brief at 6) is undercut by the evidence of record that shows that optical and digital technology is associated with the same source.

> Marvell (NASDAQ: MRVL), a technology leader in the development of broadband mixed-signal and digital signal processing technology solutions, announced today that it has become the first integrated circuit communications solutions provider to bridge fiber optic and copper networks with the introduction of the world's smallest factor Gigabit Ethernet over wire transceiver… -[T]he latest product to be introduced in Marvell's Alaska transceiver family -breaks new ground and creates an industry first by allowing the linkage of high-speed fiber optic networks with existing copper networks….
> www.marvell.com.
>
> Lucent Technologies (NYSE: LU) Microelectronics Group, the world's leading communications semiconductor business, today announced three new integrated circuits (ICs) that transmit data in high-speed fiber-optic network communications systems… The LG1627BXC clocked laser driver is used with direct modulated laser diodes in digital transmissions systems and includes differential data and clock inputs.
> www.agere.com.

These articles indicate that the source of fiber optic products and products involving digital signals are not mutually exclusive. See also Registration No. 2,486,294 (digital signal processors, integrated circuits, fiber optic cables, and fiber optic connectors). In response to these articles, applicant admits that "integrated circuit chips may be used in conjunction with fiber optic network communications." Brief at 15. Despite applicant's attempt to minimize the relatedness of these goods,[6] it is clear

[6] Applicant does argue that the chips are outside of or ancillary to the fiber optic components and the evidence fails to show "that a specific type of integrated circuit chip and software, namely, the digital signal processor and corresponding software as identified by Applicant, travel in the same channel of trade

that applicant's and registrant's goods are not dissimilar. The evidence certainly suggests that the distinction that applicant argues between fiber optic data links, sensors, and transmission apparatus and digital signal processors is overstated. We also note that applicant offers nothing other than argument of counsel to rebut the examining attorney's evidence of the relatedness of the goods. We are left to conclude that registrant's fiber optic goods and applicant's digital signal processors and other goods could be used together and the channels of trade would be similar. Therefore, we find that they are related.

Applicant argues that "customers and users of such products would be knowledgeable and sophisticated purchasers who would exercise a high degree of deliberation in their product selections." Reply Brief at 12. However, "[h]uman memories even of discriminating purchasers … are not infallible." In re Research and Trading Corp., 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), quoting, Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd., 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). When virtually identical marks, IPITEC and IPITEK, are used on the

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as fiber optic components." Brief at 15. As discussed previously, goods do not have to be identical or interchangeable for them to be considered related for likelihood of confusion purposes.

identified goods, even sophisticated purchasers would likely be confused. In re Total Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999) ("[E]ven careful purchasers are not immune from source confusion"). See also In re Hester Industries, Inc., 231 USPQ 881, 883 (TTAB 1986) ("While we do not doubt that these institutional purchasing agents are for the most part sophisticated buyers, even sophisticated purchasers are not immune from confusion as to source where, as here, substantially identical marks are applied to related products").

When we consider the marks and the goods in this case, we conclude that the typed marks are virtually the same except for the phonetically similar, "C" and "K." We also determine that the goods are related. If applicant were to use its marks on the identified goods, we find that confusion would be likely. To the extent that we have doubts, we resolve them, as we must, in favor of the prior registrant and against the newcomer. In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729, 729-30 (CCPA 1973); In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Decision: The examining attorney's refusals to register applicant's marks IPITEC, in typed and stylized

form, for the identified goods because of a prior registration for the mark IPITEK on the ground that they are likely to cause confusion are affirmed.